Shell Refining Company (Federation of Malaya) Bhd v Neptune Associated Shipping Pte Ltd (formerly known as Nepture Associated Lines Pte Ltd)

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–476 OF 2004
VINCENT NG J
29 JANUARY 2007

Civil Procedure — Pleading — Amendment of statement of claim — Application to vary amount of security — Security of release — Application made by way of affidavit — Whether fatal — Rules of the High Court 1980 O 1A

Shipping and Navigation — Action in rem — Arrest of ship — Claim against owners and others interested in ship — Amendments of claim by plaintiff — Security for release — Whether court had jurisdiction to vary guarantee — Amount of security — Whether defendant had locus to have amount of security reduced

Consequential upon the issuance of the plaintiff's writ of summons and statement of claim which claimed RM1.8m in damages, the defendant had caused to be issued a letter of undertaking ('LOU') by The Shipowners' Mutual Protection & Indemnity Association (Luxembourg) ('the P & I Club') for RM2.5m as security for the plaintiff's claim, to avert an arrest of the defendant's vessel. Upon the reduction of the plaintiff's claim by an amendment to its statement of claim, the principal amount claimed by the plaintiff was halved to RM916,048.55. The defendant had sought to have the quantum of the security to be reduced to RM1.4m.

Held, allowing the application:

(1) It is incumbent upon the court to exercise its inherent jurisdiction to reduce security when the demand for security in an admiralty claim by the plaintiff is excessive — a fortiori, as demonstrated in the instant case by the plaintiff's own application to reduce the quantum of its claim and in abuse of process of court. This was in recognition of the drastic consequences of an arrest of a vessel, and the coercive effect of a threat of arrest of a vessel. In determining what amount may reasonably be demanded as security, a plaintiff is entitled to such quantum of security as could be based upon its reasonably arguable best case, in terms of its principal claim and its reasonably recoverable interest and cost. Consequently, the plaintiff was obliged to justify its demand for security strictly upon such basis (see para 6); *The 'Moschanthy'* [1971] Vol 1 Lloyd's Reports 37 and *The 'Suhaili 5201'* [1988] 1 MLJ 210 referred.

(2) The defendant had locus to have the quantum of the security to be reduced. The LOU was furnished by the P & I Club on behalf of the defendant to secure the plaintiff's claim against the defendant and, that P & I Club furnished the LOU by reason of the defendant's entry as member with the P & I Club. It was incontrovertible that the defendant remained the party with real monetary interest in the quantum that the plaintiff may be awarded on its claim (see para 11).

(3) But for the error in the plaintiff's original statement of claim, and the plaintiff's amendment of its statement of claim, a reduction in security would not have been required. The security issue was thus properly taken by way of an affidavit of the defendant, since it was a consequential relief to the plaintiff's application to amend the statement of claim. The plaintiff did not object to taking the issue of quantum of security as a consequential relief to its amendment application. The plaintiff was thus estopped from now objecting to this procedure adopted in resolving the security issue (see para 12).

[Bahasa Malaysia summary

Berikutan pengeluaran writ saman plaintif dan penyataan tuntutan plaintif yang menuntut ganti rugi sejumlah RM1.8j, defendan telah menyebabkan dikeluarkan satu surat aku janji ('SAJ') oleh The Shipowners' Mutual Protection & Indemnity Association (Luxembourg) ('the P & I Club') sejumlah RM2.5J sebagai jaminan untuk tuntutan plaintif, bagi menghindarkan penahanan kapal defendan. Setelah pengurangan tuntutan plaintif melalui satu pindaan kepada penyataan tuntutannya, jumlah prinsipal yang dituntut oleh plaintif dikurangkan kepada RM916,048.55. Defendan memohon agar kuantum untuk jaminan itu dikurangkan kepada 1.4j.

Diputuskan, membenarkan permohonan tersebut:

(1) Adalah wajib untuk mahkamah menggunakan bidang kuasa sedia adanya untuk mengurangkan jaminan apabila tuntutan untuk jaminan dalam satu tuntutan admiralti oleh plaintif adalah melampau — a fortiori, seperti yang ditunjukkan dalam kes ini oleh permohonan plaintif sendiri untuk mengurangkan kuantum tuntutannya dan adalah satu penyalahgunaan proses mahkamah. Ini merupakan satu kesedaran tentang akibat drastik suatu penahanan kapal, dan kesan memaksa suatu ugutan penahanan kapal. Dalam menentukan jumlah yang munasabah untuk dituntut sebagai jaminan, plaintif berhak mendapat kuantum jaminan yang berdasarkan hujah terbaik yang munasabah, dalam menurut terma-terma tuntutan prinsipalnya dan faedah dan kos yang munasabah ia dapat semula. Berikutan itu, plaintif patut menjustifikasikan tuntutannya untuk jaminan berdasarkan yang berikut (lihat perenggan 6); *The 'Moschanthy'* [1971] Vol 1 Lloyd's Reports 37 dan *The 'Suhaili 5201'* [1988] 1 MLJ 210

(2) Defendan mempunyai locus untuk mengurangkan kuantum tuntutan. SAJ tersebut diberikan oleh P & I Club bagi pihak defendan untuk menjamin tuntutan plaintif terhadap defendan dan, P & I Club telah memberikan SAJ

oleh sebab kemasukan defendan sebagai ahli P & I Club. Tidak dapat dipertikaikan bahawa defendan masih merupakan satu pihak yang mempunyai kepentingan kewangan sebenar dalam kuantum yang plaintif mungkin boleh diawardkan untuk tuntutannya (lihat perenggan 11).

(3) Namun untuk kesilapan dalam penyataan tuntutan asal plaintif, dan pindaan plaintif kepada penyataan tuntutannya, satu pengurangan dalam jaminan tidak diperlukan. Isu jaminan telahpun diatasi melalui suatu afidavit defendan, memandangkan ia suatu relief penting terhadap permohonan plaintif untuk meminda penyataan tuntutan itu. Plaintif tidak membantah dengan cara isu kuantum untuk jaminan dikendalikan sebagai suatu relief penting terhadap permohonan pindaannya. Plaintif oleh itu diestop daripada membantah prosedur yang digunakan untuk menyelesaikan isu jaminan tersebut (lihat perenggan 12).]

Notes

For cases on amendment of statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5286–5291.

For cases on arrest of ship, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 931-1106.

Cases referred to

'Moschanthy', The [1971] Vol 1 Lloyd's Reports 37 (refd)
'Suhaili 5201', The [1988] 1 MLJ 210 (refd)

Legislation referred to

Rules of the High Court 1980 O 1A

Felix Raj (Shaikh David Raj) for the plaintiff.
Sitpah Selvaratnam (Tommy Thomas) for the defendant.

Vincent Ng J:

[1] On 6 September 2006 the plaintiff filed its application for leave to amend its statement of claim. On 14 September 2006, the defendant informed the plaintiff that it had no objections to the plaintiff's proposed amendments, subject to the reduction in quantum of security in the letter of undertaking dated 20 September 2004 to avert an arrest of the defendant's vessel ('the security issue'). On 12 October 2006, when granting leave to the plaintiff to amend its statement of claim by consent of parties, I reserved the security issue as a consequential relief, for hearing at a later date pending the filing of an Affidavit by the defendant on this issue. On 8 November 2006, the defendant filed its affidavit (encl 20) on the security issue. Consequential upon the issuance of the plaintiff's writ of summons and statement of claim on 19 April 2004 which claimed RM1.8m in damages, the defendant caused to be issued a letter of undertaking ('the LOU') by The Shipowners' Mutual Protection & Indemnity Association (Luxembourg) ('the P & I Club') dated 20 September 2004 for RM2.5m as security for the plaintiff's claim, to avert an arrest of the defendant's vessel.

[2] The LOU was negotiated through Messrs Tommy Thomas, solicitors for the defendant, and quantified under the following captions:

(a) Principal sum	:	RM1,800,000
(b) Interest at 8% per annum for four years	:	RM 576,000
(c) Legal Cost	:	RM 200,000
		RM2,576,000

rounded to RM2.5m. All the aforesaid are undisputed facts.

[3] Upon the reduction of the plaintiff's claim by the recent amendment to its statement of claim, the principal amount claimed by the plaintiff has now been halved to RM916,048.55. Accordingly, the defendant has sought by letter dated 14 September 2006, to have the quantum of the security to be reduced to RM1.4 million, quantified on the same basis as the aforesaid terms as the LOU as follows:

(a) Principal sum	:	RM 916,048.55
(b) Interest at 8% per annum for four years	:	RM 293,135.53
(c) Legal Cost	:	RM 200,000
		RM1,.409,184.08

Rounded to RM1.4m.

[4] The defendant states that but for the plaintiff's error in computing its original claim, the amount in the said LOU offered on behalf of the defendant would have been for the lesser sum of RM1.4m. Hence, the defendant's current offer of the revised quantum of security.

[5] The court's decision on the following three issues raised by the plaintiff:

ON JURISDICTION

[6] I am id idem with and I would adopt the ratio in *The 'Moschanthy'* [1971] Vol 1 Lloyd's Reports 37 at p 44, (High Court, England) and *The 'Suhaili 5201'* [1988] 1 MLJ 210 at p 221, Court of Appeal, Singapore. Both of which held that the Court has inherent jurisdiction to prevent any abuse of the process of court or the use of court procedure in an oppressive way. Thus, the court can and should interfere to prevent conduct of that kind, which would include control of the amount of security in rem if the amount is excessive and therefore oppressive. And that, while the court may not have jurisdiction to vary the method of giving security agreed to between the parties, the court's power to control the amount of security and actions in rem is not ousted by the mere fact that the amount of security had originally been agreed to by the parties outside and without court intervention. This is because all too often, the owners of a vessel that has been arrested have no choice but to furnish security to the plaintiffs' satisfaction if they want the vessel to be released promptly. In so acting

perforce, the owners are often in no position to assess what the amount of security should be until sufficient information of the plaintiff's claim is furnished. Thus, it has been held in *'Suhaili'* that the inherent jurisdiction of the court to prevent plaintiffs from acting oppressively by demanding excessive security must apply. It is my considered opinion that it is incumbent upon the court to exercise its inherent jurisdiction to reduce security when the demand for security in an admiralty claim by the plaintiff is excessive — a fortiori, as demonstrated in the instant case by the plaintiff's own application to reduce the quantum of its claim and in abuse of process of court. This is in recognition of the drastic consequences of an arrest of a vessel, and the coercive effect of a threat of arrest of a vessel. In determining what amount may reasonably be demanded as security, the courts have held that the plaintiff is entitled to such quantum of security as could be based upon its reasonably arguable best case, in terms of its principal claim and its reasonably recoverable interest and cost. Consequently, in the present case, the plaintiff is obliged to justify its demand for security strictly upon such basis.

[7] So as to appreciate the cogent rational which led to their Lordships' decisions it is perhaps appropriate to set out here the dicta of Brandon J in both *The 'Moschanthly'* and *The 'Polo II'*, and of Wee Chong Jin CJ in *The 'Suhaili 5201'*.

[8] In *The 'Moschanthly'* (at pp 44) Brandon J said:

> The principle to be applied is, in my view, as follows: The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case.

[9] And, in another case *The 'Polo II'* (at pp 118–119) he said:

> It was argued for the plaintiffs, however, that the Admiralty Registrar was in error in approaching the matter in this way. What he did was to treat the defendants as the successful party because the security had been reduced from the plaintiffs' figure of £19,000. For the plaintiffs, however, it was said that that was not the real question in issue. The real question was a three-fold question in issue. The real question was a three-fold question: (1) was the plaintiffs' figure of £19,000 correct; or (2) was the defendants' counterfigure of £6000 correct; or (3) was another figure correct. And it was said in effect that result (1) would have meant success for the plaintiff; result (2) would have meant success for the defendants; and result (3), which actually occurred, was a success for neither and therefore, it was said, the order should have been that the costs should be costs in cause. In my view this argument is unsound. The nature of the proceeding appears from *The Moschanthy* [1971] 1 Lloyd's Rep 37 where a similar question arose. I took the view in that case that the Court had power to control the amount of security demanded by a plaintiff in an action in rem and that the control should be exercised on the principle that a plaintiff was only entitled to demand such an amount as security as would cover his reasonably best arguable case, that is to say cover the amount of the claim, the amount of any interest that might be recoverable and the amount of any costs. And I took the view that the power of the court to control security in that way was derived from the inherent jurisdiction of the court to prevent any abuse of the process of the court, or the use of court procedure in an oppressive way. As I pointed out in that case the power to arrest a ship is a very drastic power. And the power to insist that she shall remain under arrest unless security of a certain amount is given is equally a drastic power, and my view, which I expressed in *The Moschanthy* and which I repeat now, is that that power must not be exercised oppressively, and if it is exercised oppressively then

A the court can and should interfere to prevent conduct of that kind. At the same time the court must make sure that the plaintiff is not left without sufficient security to cover his reasonably best arguable case.

On that view of the law, the security demanded by plaintiffs in an action in rem is challenged by the defendants, the question for decision by the court is whether the demand is excessive, and therefore oppressive, or not. That is the issue which is raised before the court for its determination. It is for the plaintiffs to put a figure on the amount of security which they require. It is not for the defendants to do so. It is the plaintiffs who know what the details of their claim are, what facts the claim is based on and what the extent of the claim is on the best arguable case. It is impossible for the defendants at this stage of the proceedings to have anything like the knowledge about the plaintiffs' claim which the plaintiffs have.... I indicated in *The Moschanthy* that, when a dispute of this kind arises, it is desirable that the plaintiffs should put their cards on the table and explain to the defendants on what basis it is that they are asking for the amount for which they are asking; and if they do that and if they provide the defendants with all necessary information, then the knowledge of the parties may become more equal as a result of such process. It may be that, when the defendants have been sufficiently informed about the nature and basis of the plaintiffs' claim, they will be in a position to make an assessment themselves of what the amount should be. Even so I cannot see that the defendants are under any obligation in law to make a counter offer.

[10] In *The 'Suhaili 5201'* (at pp 220, 221 and 222) Wee Chong Jin CJ expressed, in similar vein, as follows:

Before us, counsel for the appellants conceded, during the course of arguments, two matters. Firstly, counsel for the appellants conceded that the court had jurisdiction to vary the amount of the security to be provided. In this respect, we would merely add that we have no doubt whatsoever that there was jurisdiction to moderate the amount of the security in this case. In our judgment, whilst the court may have no jurisdiction to vary the method of giving security agreed to between the parties, the court's power to control the amount of security in actions in rem is not ousted by the mere fact that the amount of security had originally been agreed to (see *The Moschanthy, The Polo II*, and *The Ling Yung* at p 218). All too often, the owners of a vessel that has been arrested have no choice but to furnish security to the plaintiffs' satisfaction if they want the vessel released fast. In doing so, the owners are often in no position to assess what the amount of security should be until sufficient information as to the plaintiffs' claim is furnished. In these circumstances, it seems to us an unacceptable proposition to say that the court has jurisdiction to moderate the security sum where security is furnished by way of bail but not where the method of giving security has been agreed to and is not by way of bail. The inherent jurisdiction of the court to prevent plaintiffs from acting oppressively and abusing the process of the court by demanding excessive security must equally apply in either case.

It is not in dispute that on established principles of law, the appellants are entitled to sufficient security to cover the amount of their claims with interest and costs on the basis of reasonable arguable best case: *The Moschanthy*. However, they are not entitled to security in respect of claims which can be described as 'hopeless' and therefore not reasonably arguable.

However, in respect of the appellants' claim of $1,200,000 (Invoice No 014-86), we agree with the learned judge that the appellants are not entitled to security to the extent of $500,000. This particular invoice was in respect of the main contract relating to modification works on the 'Suhaili 5201'. The contract expressly provided for the total contract sum of $1,200,000to be paid in instalments. Pursuant to clause 3, the final

instalment of $500,000 was not payable until 1 September 1986. The writ was issued on 1 July 1986 on which date no cause of action for the $500,000 existed.

... Accordingly, we allowed the appeal, set aside the order of the High Court, and reduced the amount of security furnished by the respondents to $230,000.

ON LOCUS STANDI

[11] I would hold that the defendant has locus on the following grounds. It is undisputed that the LOU is furnished by the P & I Club on behalf of the defendant to secure the plaintiff's claim against the defendant in this action. And, that P & I Club furnished the LOU by reason of the defendant's entry as member with the P & I Club. It is incontrovertible that the defendant remains the party with real monetary interest in the quantum that the plaintiff may be awarded on its claim. It is trite law that any party with interest in the subject matter of the claim has a right to and could apply to intervene in the proceeding. Most pertinently, in the instant case, such application to intervene is not necessary as the defendant is already a party in this suit. It must also be borne in mind that the defendant's application was made wholly consequential to the plaintiff's application to reduce the quantum of its claim and that it was indeed agreed upon by the defendant subject to a reduction of the security in the LOU. Also, it cannot be gainsaid that the quantum of security now sought to be reduced faithfully corresponded with the plaintiff's own calculation on the quantum that it demanded when the LOU was negotiated. And, that the defendant has agreed to the plaintiff's amendments to its claim subject to a corresponding reduction of the quantum of the security agreed perforce; since it entailed the coercive effect of the threat of arrest of a vessel.

ON PROCEDURE

[12] But for the error in the plaintiff's original statement of claim, and the plaintiff's amendment of its statement of claim, a reduction in security would not have been required. I would thus hold that the security issue is properly taken by way of an affidavit of the defendant's solicitors affirmed on 8 November 2006 (encl 20), since it is a consequential relief to the plaintiffs application to amend the statement of claim. In any event, at the hearing of its application for amendment and despite the letter dated 12 October 2006 issued to the plaintiff on the defendant's behalf, the plaintiff did not object to the taking of the issue of quantum of security as a consequential relief to its amendment application. The plaintiff is thus estopped from now objecting to this procedure adopted in resolving the security issue. The current case raises an eminently suitable fact matrix from the invocation of O 1A of the Rules of the High Court 1980 by this court.

ON FAIR QUANTUM

[13] As the claim is now reduced by half to RM916,048.55, it would logically follow that RM2.5m quantified in the LOU ought to be reduced by RM900,000 with a concomitant reduction of about RM283,000 in interest. Rightly, therefore, the security quantum in the LOU dated 20 September 2004 should be reduced to RM1.4m, as the reasonably arguable best quantum. I would thus allow under O 15

r 16, the defendant's application for reduction of the security to RM1.4m, with costs in the cause. This court could well perceive the predicament that the defendant now faces: having parted perforce with such a substantial sum, to the plaintiff, that is in excess of the fair amount of security, it is indeed unnatural to expect the plaintiff to return the excess sum without a robust battle at all the appellate levels.

Application allowed.

Reported by Peter Ling